

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAREN E. HUNT and U.S. POSTAL SERVICE,
POST OFFICE, Watertown, MA

*Docket No. 98-978; Submitted on the Record;
Issued December 10, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether appellant carried her burden of proof to establish that she sustained a recurrence of disability on or after April 24, 1997 causally related to her February 10, 1996 employment injury; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for a merit review pursuant to 5. U.S.C. § 8128.

On February 10, 1996 appellant, then a 40-year-old postal clerk, was injured in the performance of duty when she slipped and fell on ice at work. An x-ray of the lumbar spine dated February 12, 1996 revealed degenerative disc disease at L4-5 with no evidence of a fracture or subluxation. The Office initially accepted the claim for low back strain, but it was expanded to include a herniated disc at L4-5. Appellant missed four days of work and returned to light duty, working a part-time shift. She began working an eight-hour shift of light duty on May 1, 1996.

Appellant subsequently filed three claims for recurrence of disability beginning February 28 and May 6, 1996 and January 6, 1997. The Office approved the claims and appellant received compensation for wage loss.

In an attending physician's report dated March 4, 1997, Dr. Michael P. Owen, a Board-certified neurological surgeon and appellant's treating physician, diagnosed low back and bilateral leg pain secondary to a probable left L4-5 disc herniation, as well as a central focal protrusion at L5-S1. He referred appellant for a course in pain management. Dr. Owen also prescribed a series of steroid injections and physical therapy.

In an April 18, 1997 report, Dr. Owen approved appellant for full unrestricted duty effective April 21, 1997.

Appellant returned to her regular duties on April 22, 1997, worked two days and left on April 24, 1997 complaining of back pain.

In an April 25, 1997 report, Dr. Owen advised that appellant could return to work on April 26, 1997 providing that she only work four hours per day.

She returned to work in a part-time position on August 28, 1997.¹ She filed a series of claims (Forms CA-8) for wage loss based on disability.

Appellant also filed a claim alleging that she sustained a recurrence of total disability from April 24 to April 28, 1997.

By letters dated May 21 and June 18, 1997, the Office advised appellant to submit a rationalized medical opinion or her claim would be denied.²

Appellant submitted a series of test results, including a gallbladder ultrasound, an upper GI series and blood tests taken during the period June 1 to 6, 1997.³

In a decision dated July 22, 1997, the Office denied appellant's claim for recurrence of total disability on April 24, 1997 and then disability for four hours per day on and after April 26, 1997, on the basis that the evidence of record was insufficient to establish that the claimed recurrence of disability was causally related to the accepted work injury of February 10, 1996.

In a letter date-stamped as received by the Office on September 8, 1997, appellant requested reconsideration of the Office's July 22, 1997 decision.

In support of her reconsideration request, appellant submitted an August 20, 1997 report from Dr. Owen, who noted therein that appellant continued to have symptoms related to her work injury on July 20, 1996. Dr. Owen discussed appellant's prior history of treatment and outlined appellant's subjective complaints. He also noted that imaging studies supported definite abnormalities in appellant's lumbar spine. According to Dr. Owen, appellant was disabled. He concluded his report by stating that the Office was an "unsympathetic federal bureaucracy" that unfairly discontinued benefits to patients simply because they were unable to procure the necessary paperwork from busy physicians.

In a decision dated December 5, 1997, the Office denied appellant's request for a merit review, finding Dr. Owen's August 20, 1997 report to be irrelevant and immaterial to the issue of the case.

¹ The employing establishment offered appellant a limited-duty position, working four hours a day, which she accepted on April 28, 1997.

² Although appellant submitted a series of physical therapy treatment records from Good Samaritan Hospital, as a physical therapist is not a physician for the purposes of the Federal Employees' Compensation Act, any notes or records pertaining to physical therapy are not considered to be medical evidence. See *Jane A. White*, 34 ECAB 515 (1983).

³ Appellant submitted a February 3, 1997 report from Dr. Richard Hughes, an osteopath, which discussed appellant's physical therapy treatment. Dr. Hughes' report predated the alleged date of recurrence of disability and was therefore insufficient to meet appellant's burden of proof.

The Board finds that appellant failed to establish that she sustained a recurrence of disability on or after April 24, 1997 causally related to her February 10, 1996 work injury.

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.⁴ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.⁵ An award of compensation may not be made on the basis of surmise, conjecture, or speculation or on appellant's unsupported belief of causal relation.⁶

In the instant case, the Office accepted that appellant sustained a low back strain and a herniated disc at L4-5. Appellant was ultimately approved by her treating physician, Dr. Owen, for a return to her regular duties on an eight-hour shift effective April 21, 1997. After working two days, appellant claimed that she sustained a recurrence of disability. Without any medical explanation whatsoever, Dr. Owen subsequently stated in an April 25, 1997 report, that appellant should only work a four-hour shift.

Because appellant carries the burden of proof in establishing her claim for recurrence of disability, she was required to submit a rationalized medical opinion which fully explained the causal relationship between her back condition on or after April 24, 1997 and the February 10, 1996 work injury. The Office specifically advised appellant to submit such a rationalized medical evidence explaining how she sustained a recurrence of disability or else her claim would be denied. She failed to do so. Thus, inasmuch as there is no rationalized medical opinion of record from which to conclude that appellant sustained a recurrence of disability on or after April 24, 1997, the Office properly denied her claim.

The Board also finds that the Office properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.⁷

Section 8128(a) of the Act, vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.⁸ The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not

⁴ *Dominic M. DeScala*, 37 ECAB 369 (1986); *Bobby Melton*, 33 ECAB 1305 (1982).

⁵ *See Nicolea Bruso*, 33 ECAB 1138 (1982).

⁶ *Ausberto Guzman*, 25 ECAB 362 (1974).

⁷ Appellant submitted evidence subsequent to the Office's December 5, 1997 decision. The Board does not have jurisdiction to review evidence that was not before the Office at the time it issued its final decision; *see* 20 C.F.R. § 501.2(c).

⁸ 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁹ When application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.¹⁰ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹¹ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.¹² Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.¹³

In support of her reconsideration request, appellant submitted an August 20, 1997 report from Dr. Owen in which he noted appellant had subjective complaints and physical findings related to straight leg raising and back extension. Although Dr. Owen considered appellant to be disabled from work, his report was not obtained until four months after the alleged recurrence of disability on April 24, 1997. Dr. Owen failed to provide any discussion as to how appellant sustained a recurrence of disability on April 24, 1997 causally related to her employment injury of February 10, 1996. He also offered no explanation of the role of appellant's degenerative back disease with respect to appellant's back complaints. In the absence of a rationalized medical opinion from Dr. Owen finding that appellant sustained a recurrence of disability on or after April 24, 1997 causally related to the February 10, 1996 work injury, there is no basis for reopening appellant's claim for a merit review. Accordingly, because Dr. Owen's report fails to provide new and relevant medical findings with respect to the issue of recurrence of disability, his opinion is deemed to be irrelevant and not sufficient to warrant review of the prior decision.

⁹ 20 C.F.R. § 10.138(b)(1).

¹⁰ 20 C.F.R. § 10.138(b)(2).

¹¹ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

¹² *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹³ *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

The decisions of the Office of Workers' Compensation Programs dated December 5 and July 22, 1997 are hereby affirmed.

Dated, Washington, D.C.
December 10, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member